No. 13127

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

INLAND MOTOR FREIGHT, INC., a Corporation, and PACIFIC HIGHWAY TRANSPORT, INC., a Corporation,

Appellants,

vs.

ANCHOR CASUALTY COMPANY, a Corporation,

Appellee.

APPELLEE'S ANSWER BRIEF

Upon Appeal from the District Court of the United States for the Eastern District of Washington

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JURISDICTION

This action was brought by appellee Anchor Casualty Company, a Minnesota corporation, having its principal place of business in St. Paul, Minnesota, against the appellant Inland Motor Freight, Inc., and Pacific Highway Transport, Inc., both Washington corporations having their principal places of business in Spo-

kane, Washington (Tr. 3). The action was predicated upon a policy of insurance issued by the appellee covering trucks and automotive equipment operated by appellants. The amount of recovery sought was $5,121.40, together with interest thereon at the rate of 6% per annum from June 1, 1949, to the date of judgment herein, no part of which was admitted, but all liability was denied by the appellants (Tr. 30). The amount in controversy was therefore in excess of $3,000.00.

Jurisdiction of the District Court existed under Sec. 1332, Title 28, U. S. C. A. (amended).

The appellants have appealed from the final judgment granting relief to plaintiff entered July 30, 1951 (Tr. 45). Notice of appeal was served upon attorneys for appellee and filed August 28, 1951 (Tr. 47).

Jurisdiction of the 9th Circuit Court of Appeals to review the case is believed to exist under Sec. 1291, Title 28, U. S. C. A. (amended).

COUNTER-STATEMENT OF THE CASE

Appellants' brief statement of the case is controverted in two respects. Appellants' statement of the case is controverted wherein, first, it is stated that the cancellation by appellants of the insurance coverage was "after request and invitation so to do." Second, the statement that the policy form was altered by endorsement (Br. 6). The following somewhat more extended statement of the facts should be of assistance to the Court.

This action was brought by appellee to recover from appellants a balance alleged to be owing as premium on an insurance policy issued by appellee to appellants. Appellant corporations were engaged on April 1, 1949, in the operation of freight lines for the transportation of freight by motor trucks. Their motor vehicles were insured against property damage and bodily injury liability by appellee. It was alleged in the complaint (Tr. 3-6) and admitted by the answer (Tr. 32-33), and stipulation (Tr. 37-38), that the policy was procured by the appellants and issued by the appellee to them on or about April 1, 1949; that it insured appellants for a period of one year from said date against public liability and property damage in the operation of automotive equipment operated by them; that it provided that the premiums should be paid by appellants monthly in amounts based upon the gross receipts of their operations; that it provided it might

be cancelled by appellants, in which case the earned premiums were to be computed in accordance with the customary short rate table and procedure (short rate table is printed on the policy) (Tr. 10); that appellants cancelled the policy when it had been in force 61 days; that an amount *equaling* the premiums for the 61 days, computed at the full period rate named in the policy, had been paid, but that the earned premiums for the 61 days of actual coverage, computed at the short rate, exceeded that amount by $5,121.40, which is the amount for which, together with interest, the suit was brought.

On the last page of the policy, Section 22, cancellation specifically provides, in part:

> ". . . If the named insured cancels, earned premiums shall be computed in accordance with the *customary short rate table and procedure.* (Italics ours.) If the company cancels, earned premiums shall be computed pro rata . . ." (Tr. 10).

Also on the last page and following the text of the policy was a table headed "SHORT RATE CANCELLATION TABLE for Term of One Year." According to the table, 27 per cent of the annual premium was to be charged when the policy had been in force 61 days (Tr. 61). By bill of particulars appellee filed a copy of the insurance policy which appears in full at pages

7-29 of the transcript, the verity of which was admitted by appellants (Tr. 34). Appellee contended and the District Court held that this short rate should be applied and that it should be computed by dividing the earned premium for the 61-day period by 61 and then multiplying by 365 to arrive at the estimated annual premium. The short rate would be 27 per cent of that sum. Endorsement No. 7 (Tr. 25) recited that the earned premium should be computed and paid monthly by applying to the gross receipts as therein defined the rate of $.90 a hundred for appellant Inland Motor Freight, Inc., and $1.35 a hundred for appellant Pacific Highway Transport, Inc. This endorsement No. 7 specifically stated that it was "subject in all other respects to the limits of liability, exclusions, conditions and other terms of the policy." In addition to the pleadings, a stipulation of the parties and admission of appellee corporation pursuant to Rule 36, there was filed the deposition of Gus H. Nieman, the president of the appellant corporations. Based upon the record, consisting of the foregoing, each of the parties moved for summary judgment. The Court granted the motion of plaintiff and entered judgment for the amount sued for in the complaint, from which judgment this appeal is taken.

ARGUMENT

Appellants attack the judgment upon the ground that the short rate cancellation clause of the printed portion of the policy (Tr. 10, par. 22) was not applicable. They contend, first, that the printed clause mentioned was altered by Endorsement No. 7 (Tr. 25-27) and that the two provisions conflict, and, second, that the cancellation was requested and induced by appellee.

I. POLICY WAS NOT ALTERED

Endorsement No. 7 did not alter the short rate cancellation clause. The only one of the nine endorsements which bears on the question is endorsement No. 7 which made provision for a monthly payment of the premium for the convenience of the assured.

(1) There was a fixed premium: $.90 and $1.35 for each hundred dollars of gross receipts of appellants Inland Motor Freight, Inc., and Pacific Highway Transport, Inc., respectively. Gross receipts are defined in the policy to mean total gross revenue before deductions of any charges or expenses (Tr. 25, 26).

(2) The short rate cancellation table (Tr. 8) and the appellants' own record were the means for computing the premium (Tr. 50, 51, 59, 62-65).

The short rate cancellation table for a term of one year provided that 27 per cent of the annual premium should be charged when the policy had been in force 61 days and was cancelled by the appellants. This short rate should be applied and should be computed by dividing the earned premium for the 61-day period by 61, then multiplying by 365 to arrive at the estimated annual premium. The short rate would be 27 per cent of that sum. By that method of computation the short rate premium, less the amount paid, would be $2,529.91 for appellant Inland Motor Freight, Inc., and $2,591.53 for appellant Pacific Highway Transport, Inc. (Tr. 40, 41).

(3) The fact that the parties to the insurance contract made provision for monthly payment of the premium rather than one single large payment prepaid makes no difference as to the operation of the short rate cancellation table. This same endorsement required the insured to pay a deposit premium of $4,500.00 to be applied to the earned premium "for the last month of the policy period as computed above." Endorsement No. 7 was put on for the convenience of the insured appellant corporations and specifically recites that it is "subject in *all other respects* to the limits of liability, exclusion, *conditions and terms of the policy.*" (Italics ours.) (Tr. 25.)

After submission of memoranda by both parties the trial Court took the matter under advisement and sub-

sequently rendered his opinion in favor of appellee, citing in support of his decision the following cases:

Aetna Life Ins. Co. v. American Zinc Lead & Smelting Co., 154 S. W. 827 (1913);

Aetna Life Ins. Co. v. Kansas City Electric Light Co., 171 S. W. 580 (1914);

Big Run Coal Co. v. Employers Indemnity Co. 174 S. W. 25 (1915);

Joseph Weaver & Son v. Home Life & Accident Co., 221 S. W. 299 (1920);

Maryland Casualty Co. v. Boise Street Car Co., 11 P. (2d) 1090 (1932).

In the *American Zinc Lead & Smelting Co.* case, *supra,* an insurance policy for twelve months which contained a special written provision for paying the premium *monthly,* as did Endorsement No. 7 in the case at bar, was held to be a contract for a year and the special written provision was held not to give the assured the right to cancel without the application of the short rate cancellation table. The same question was involved as in the case at bar which was thus described by the District Court here (Tr. 40): "The question to be determined is whether defendants, because of their cancellation of the policy, should be charged according to its short rate cancellation provisions—that is to say, 27 per cent of the annual premium." In the *American Zinc Lead & Smelting Co.* case, *supra,* the Court said at page 829:

> "In fact, the method or time of paying the premium, whether in advance or at the termination of the policy period, or in one or many payments, would ordinarily have nothing to do with the provisions or terms for cancellation of the policy."

Endorsement No. 7 does not conflict with the short rate cancellation clause. (Compare Tr. 25-26 with Tr. 10.) As was said in *Aetna Life Ins. Co. vs. Kansas City Electric Light Co., supra,* "Effect must be given, if possible, to all parts of the instrument. Different portions are not to be deemed conflicting, if they can be harmonized and both upheld."

In *Big Run Coal Co. v. Employers Indemnity Co., supra,* where an indemnity insurance policy was involved, the Court observed at page 26, in language which could be applied to the case at bar:

> "The policy, however, provided, that it might be cancelled at any time, by either of the parties, upon written notice to the other party stating when thereafter the cancellation should become effective, and that the date of the cancellation should be the end of the policy period. If the policy should be cancelled at the request of the appellant, the amount to be paid as a premium by appellant should be the compensation for the full original policy period to the date of cancellation, and the earned premium calculated at the customary short rates, in accordance with a table printed on the policy."

Again, a rider appended to a policy of Workmen's Compensation insurance issued to an employer was

involved in the case of *Joseph Weaver & Son v. Home Life Accident Co., supra,* where it was held not to have modified the short rate cancellation clause, and hence where the policy was cancelled before the expiration of the period it had to run (as in the case at bar) the premium must be computed according to the short rate cancellation clause. In language singularly apropos to the facts in the case at bar the Court there said:

> "First, there is no suggestion in the 'rider' that it referred to, modified, extended, or limited in any way the terms of the short rate cancellation clause . . . This 'rider' does not reduce this policy from a yearly contract to a monthly contract. By its terms it permitted appellants to pay the premiums monthly, rather than on the terms stated in the original policy, which contemplated and provided for the premium to be paid for the whole year in advance."

Finally, in several important respects the case at bar is similar to the case of *Maryland Casualty Co. v. Boise Street Car Co., supra,* where it was held that although computation of premiums on a bus carriers' liability policy was based on actual gross earnings for a year, a provision for a short rate premium on cancellation of the policy before the year had expired by the insured was valid. It was further held that the method by which the insured's actual earnings for the year could be approximated as a basis for determining this short rate premium on the cancelled policy could be by obtaining the average daily gross receipts for

the period the policy was in force and multiplying the result by the days in the year.

In the case at bar, as the District Court pointed out (Tr. 39) on the last page of the policy a section in print designated as Paragraph 22 headed "Cancellation" (Tr. 10) provided that:

> "This policy may be cancelled by the named insured by surrender thereof or by mailing to the company written notice stating when thereafter such cancellation shall be effective. This policy may be cancelled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancellation shall be effective . . .
>
> "If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premiums shall be computed pro rata."

In the Maryland Casualty Company case there was a similar provision which provided, in part:

> "H. This policy may be cancelled by the company at any time by written notice sent by registered mail or delivered to the Assured stating when thereafter the cancellation shall be effective. It may be cancelled by the assured by like notice. If cancelled by the company, the company shall be entitled to the earned premium, pro rata. If cancelled by the assured, the company shall be entitled to the earned premium calculated at short rates, in accordance with the printed table on the back of the policy . . .

> "Printed on the back of the policy was a table of short rates 'For One-Year Policies.' It is conceded by counsel that, if the short rate applies to this case, the premium for the 209 days the policy was in force would be 74.84 per cent of the premium for one year."

The District Court in the case at bar summarized the insurer's position when he stated:

> "Plaintiff contends that the short rate should be applied and that it should be computed by dividing the earned premium for the 61-day period by 61; then multiplying by 365 to arrive at the estimated annual premium. The short rate would be 27 per cent of that sum." (Tr. 40.)

This same method of computation by the insurer was upheld by the Court in the Maryland Casualty Co. case, *supra,* which observed at page 1094:

> "Since the policy was terminated before the end of the policy year, it is manifest that it had expired and that no basis for the ascertainment of the gross earnings for a year could be determined from the actual gross earnings for a year which had not then elapsed. Practically the only method by which the actual earnings for a year could be approximated was to divide the amount of the actual gross earnings, developed by audit, for the number of days the policy was in force, by such number (209), thereby obtaining the average daily gross receipts for said period (209 days), and multiplying the result by 365. This procedure seems to have been recognized by the courts in the interpretation of analogous contracts involving premiums based upon annual pay rolls, although

the reports do not always definitely disclose the policy provisions upon which some of these decisions are based.

"*Big Run Coal Co. v. Employers' Indemnity Co.* 163 Ky. 596, 174 S. W. 25;

Bituminous Casualty Corp. v. Marion County Coal Co. 258 Ill. App. 6;

Joseph Weaver & Son. v. Home Life & Accident Co. (Tex. Civ. App.) 221 S. W. 299;

Commercial Casualty Co. v. Rice, 93 Misc. Rep. 567, 157 N. Y. S. 1."

Each of these decisions, in one or more respects, refutes appellants' contentions. None to the contrary are cited by appellants. Appellants seek (Br. 9) to distinguish them from the case at bar, but we find no such distinction. Rarely does one find cases so nearly identical on the facts and questions of law involved as are they with the case presented here.

Appellants point out that the printed portion of the policy here is adapted to coverage for a single motor vehicle, and apparently assume that the use of riders to cover a fleet must constitute a change in its terms.

In *Maryland Casualty Co. v. Boise Street Car Co.* (Idaho) 11 P. (2d) 1091, the appellant operated a fleet of eight passenger busses. There is nothing unusual in the form of the policy. It is of a class described in 45 C. J. S. 122, particularly in the second paragraph

appearing on that page. In indemnity policies, where either the subject matter or the method of determining premium is extensive or complicated, no printed form could be devised practicably adaptable to the multitude of particular situations of the businesses to be insured by mere filling in of blanks. In such cases the adaption to the facts is made by riders or "endorsements" as here. The cases cited above illustrate the practice followed here by appellee. The method of computation of the premiums was embodied in Endorsement No. 7 (Tr. 25-27), which was signed by the insurer by its president, dated the same day as the policy, referring to and forming a part of it.

Endorsement No. 7 provided, among other things, that the insured should pay at the effective date of the policy, a required deposit of $4,500.00; that the earned premium should be computed and paid monthly by applying specified rates to the gross receipts of the two corporations, and the deposit premium expressed on the first printed page to be applied to the last monthly earned premium, with proper adjustments, if any. It defined gross receipts, provided for inspection, and identified the policy to which it was attached. The rider made no reference to cancellation and contained no suggestion of change of the printed policy in any respect, but closed with the express statement "subject in all other respects to the limits of liability, exclusions, conditions and other terms of the policy."

The entire substance of the premium provisions of the rider could as well have been written into the blank on page 1 of the policy (Tr. 7) designated "Premiums," had the space permitted; there would have been no conflict between the provision so inserted and the printed Paragraph 22, nor any ambiguity as to the cancellation privilege. Nor is any conflict or ambiguity created by the use of the rider in lieu of filling a blank. Indeed, appellants must have looked to Paragraph 22 for the right to cancel at all; and certainly there was nothing in Endorsement No. 7 that could be construed as avoiding Paragraph 22 in part and retaining it as to the remainder.

A rider attached to a policy is to be construed in connection with the other provisions of the policy and the entire contract harmonized therewith if possible.

> "Notwithstanding the attaching of a rider, provisions of the body of the policy are still parts of the contract and are not superseded, waived, limited or modified by the provisions of the rider, except to the extent that it is expressly stated in the rider that the provisions thereof are substituted for those appearing in the body of the policy, or that the provisions of the rider have the effect of creating a new and other contract from that of the original policy."

44 C. J. S. 207

> "It is well settled that all parts of an insurance policy must, if possible, be harmonized and given effect. Unless the rider is irreconcilable with the printed clause, such must stand."

Aetna Insurance Company vs. Sacramento-Stockton Company, (CCA, 9th Cir.) 273 F 555.

The rules quoted by appellants (Br. 9-11) to the effect that an insurance policy reasonably capable of two constructions must be construed most favorably toward the insured, and that if the meaning of a written agreement is doubtful, it should be interpreted against the party who has drawn it and that in such case, a written part of the contract will prevail over a printed part, are, of course, elementary. But none of them apply where the contract is free from ambiguity. Without extending this brief by citations, we cite here each of the decisions cited hereinabove (p. 8), and we quote from *Miller v. Penn Mutual Life Ins. Co.,* 189 Wash. 269 at 275, 64 Pac. (2d) 1050, and refer to the citations therein as follows:

> "The rule that the contract will be construed most favorably to the insured will be applied only when there is an unexplained ambiguity in the language of the contract. It is well settled that all parts of an insurance policy must, if possible, be harmonized and given effect. (Citations.)
>
> "The liability of respondent is fixed by the terms of the contract, and its terms, if plain and free from ambiguity, must control. (Citations.)
>
> "In thus construing the policy we are not unmindful of the rule that policies are construed in favor of the insured and most strongly against the insurer, as held in *Starr v. Aetna Life Ins. Co., supra* (41 Wash. 199, 83, Pac. 113) but this rule

> should not be permitted to have the effect to make a plain agreement ambiguous and then interpret it in favor of an insured. (Citations.)
> * * *
>
> "Unless the rider on the insurance policy is irreconcilable with the printed clause, such clause must stand; but if it is inconsistent and irreconcilable, the rider will control. (Citations.)

II. APPELLEE DID NOT CANCEL

Appellants allege as an affirmative defense (Tr. 30-31) that after the issuance of the policy in April, 1949, and prior to its cancellation, appellee told them the rates would be increased and that they would have to agree to the increase effective from and after June 1, 1949, and if they failed to agree to such increase the policy would be cancelled. This affirmative defense was denied by reply (Tr. 32). The evidence falls far short of establishing the facts so pleaded. No evidence was introduced other than the deposition of Gus H. Nieman, president of appellant corporations (Tr. 48-66). He testified to a conversation with the brokers through whom both the then existing policy issued by appellee and the policy here involved were obtained. The conversation was had in January, 1949 (Tr. 55), some 60 days before the issuance of the present policy on April 1, 1949, rather than afterwards as pleaded. In that conversation he states (Tr. 52) the broker told him they would have to increase the rate, and if he could find other coverage he should do so; and that (Tr. 55) the broker gave him just 90 days to pay the

increase or find something else. After this conversation was had nothing was done by either party within the 90 days except that within some 60 days, on April 5th, as of April 1st, the policy here involved was procured by appellants and issued by appellee, without any mention of cancellation except on the usual terms. That it was so procured and issued is admitted by appellants in the pleadings; that it was accepted by them is evidenced by the facts, among others, that they paid the specified $4,500.00 deposit as premium and paid the April and May premiums earned under its terms.

In the absence of fraud or mistake, a policy of insurance on acceptance thereof supersedes all preliminary negotiations and agreements, even though the insured does not read it. It is his duty to read it and he is presumed to have knowledge of and to have assented to all the provisions and cannot plead ignorance of its conditions or legal effect:

> 44 C. J. S. 1071-1072
>
> *Abelson v. Fidelity & Casualty Company,* 164 Wash. 20, 2 Pac. (2d) 272;
>
> *Vermillion, etc. Co. v. Norwich Union Fire Insurance Society* (C. C. A. 9th) 146 F 695, (cited in *Lumber Underwriters v. Rice,* 237 U. S. 605);

and parol evidence cannot be admitted to vary the contract. (Ibid.)

Furthermore, evidence of any alleged verbal agreement would be incompetent because, (1) it would vio-

late the parol evidence rule; (2) it would violate Washington State Insurance Code §45.18.19 (RRS 1947 Supp. p. 574) which provides, "No agreement in conflict with, modifying or extending any contract of insurance shall be valid unless in writing and made a part of the policy." Also, to pro rate such a policy would be violative of Washington Code §45.30.14 relative to rebates and discounts. (RRS 1947 Supp. p. 660.)

Finally, there is no pleading or evidence of any kind indicating that the appellee ever agreed for any cancellation of the policy other than on the short rate term. Mr. Gus H. Nieman testified for appellants, in part, "I don't recall the exact transaction that took place regarding the cancellation." (Tr. 52.) As president of appellant corporations he apparently didn't know much about the policy at all. He said, "I didn't even know the policy expired, had no idea when the policy expired or when or why." (Tr. 57.) Certainly this is not sufficient evidence to reform a written instrument. Indeed, the whole defense seems to be a matter of hindsight. The fact of the matter seems to be that the appellant corporations cancelled because they wanted to go into an insurance company of their own, the Transport Indemnity, in which they were personally interested along with 150 or more other truckers (Tr. 55). That was their privilege but they should abide by the written contract they had previously made and pay for that privilege by way of the short rate cancellation table.

CONCLUSION

In conclusion we repeat that the five decisions hereinabove cited (page 8) clearly support the judgment herein on almost identical facts; that here, as in them, there is no ambiguity or conflict between the provisions of the policy; that, therefore, each of its provisions, including that specifying the application of the short rate table to the premium computation, must be given effect if the Court is not to write a new contract for the parties; and that the judgment should be affirmed.

Respectfully submitted,

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